BAHRUNI ISMAIL

v.

PENDAKWA RAYA

FEDERAL COURT, KUALA LUMPUR
ANUAR ZAINAL ABIDIN CJ (MALAYA)
MOHD AZMI FCJ
SHAIK DAUD ISMAIL JCA
[CRIMINAL APPEAL NO: 05-192 OF 1990]
17 FEBRUARY 1997

CRIMINAL PROCEDURE: *Prosecution - End of prosecution case - Standard of proof -Whether proof beyond reasonable doubt - Fundamental difference between prima facie proof and proof beyond reasonable doubt - Consideration of Arulpragasan Sandaraju v. Public Prosecutor - Amendment to s. 180 Criminal Procedure Code - Applicability - Whether only applicable to cases filed after 31 January 1997*

DANGEROUS DRUGS: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in heroin - End of prosecution case - Standard of proof - Whether proof beyond reasonable doubt - Existence of evidence of trafficking alongside evidence of possession for own consumption - Accused called to enter defence on charge of trafficking - Whether a misdirection - Whether trial Judge applying wrong standard of proof - Dangerous Drugs Act 1952 ss. 39A(2)(a), 39B(1)(a) - Criminal Procedure Code s. 180*

The appellant was charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 for trafficking in 24.88 grammes of heroin on 14 April 1985, and was sentenced to death in 1990 upon his conviction. The appellant appealed and argued in effect that the conviction was flawed as the Court below was wrong in calling for his defence.

It was not in dispute that in the Court below, at the close of the case for the prosecution, the evidence as adduced by the prosecution was consistent both with the appellant having committed the offence of trafficking, and his having possession of the drugs for his own consumption and not for purposes of trafficking. The facts also showed that the learned Judge, in calling for the defence, had applied the *prima facie* standard of proof, following no doubt the case of *Munusamy v. Public Prosecutor*. Before the Federal Court herein, the primary question that arose was whether, bearing in mind the recent decision in *Arulpragasan v. Public Prosecutor,* and the amendment to s. 180 Criminal Procedure Code that followed, the learned trial Judge had misdirected himself in law in opting for the *prima facie* standard of proof and callling for the appellant's defence.

Held:
Per Shaik Daud Ismail JCA

[1] In the light of the decision in *Arulpragasan a/l Sandaraju v. Public Prosecutor*, the law on the standard of proof required of the prosecution at the close of its case is settled and that is proof beyond a reasonable doubt.

[2] Since, at the close of the case for the prosecution, the evidence pointed to two conflicting versions of the prosecution case, namely, that the appellant was in possession of the drugs for the purpose of trafficking, or alternatively, that he was in possession of same for his own consumption sufficient to rebut the presumption of trafficking, the prosecution could not be said to have proved its case beyond reasonable doubt, although it might be sufficient to establish a *prima facie* case. The learned trial Judge, thus, was wrong in law in calling for the defence on the charge of trafficking.

[3] The learned Judge cannot be faulted for following *Munusamy v. Public Prosecutor* as at that time that was the only interpretation of s. 180 Criminal Procedure Code. Nevertheless, in view of the majority decision in *Arulpragasan*, it must be taken that the interpretation of s. 180 all along ought to have been the beyond reasonable doubt test, and not the *prima facie* standard.

[4] The amendment to s. 180 Criminal Procedure Code providing for a *prima facie* standard of proof at the close of the case for the prosecution has no retrospective effect. Therefore, the amendment, having been gazetted on 30 January 1997, would for all practical purposes come into effect only on 31 January 1997. The amendment would thus apply to all cases filed after that date (including decided cases pending appeal) but not otherwise. In all cases before 31 January 1997, the beyond reasonable doubt standard of proof must apply.

[5] As the learned Judge had misdirected himself on the standard of proof when calling upon the appellant to enter into his defence on the trafficking charge, the appellant's conviction under s. 39B(1)(a), accordingly, ought to be, and is hereby quashed. Applying the standard of proof of beyond a reasonable doubt, however, there was overwhelming evidence of possession of the drug at the close of the case for the prosecution. That being so, the appellant is convicted under s. 39A(2)(a) of the Dangerous Drugs Act 1952, and sentenced to 15 years imprisonment plus 10 strokes of the rotan.

[Appeal allowed. Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR JENAYAH: *Pendakwaan - Akhir kes pendakwaan - Standard pembuktian - Samada melebihi keraguan munasabah - Perbezan asas antara bukti prima facie dan bukti melebehi keraguan munasabah - Pertimbangan Arulpragasan Sandaraju v. Pendakwaraya - Pindaan kepada s. 180 Kanun Acara Jenayah - Pemakaiannya - Samada hanya terpakai kepada kes-kes yang difailkan selepas 31 Januari 1997*

DADAH BERBAHAYA: *Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 - Mengedar heroin - Akhir kes pendakwaan - Tahap pembuktian - Samada pembuktian melebihi keraguan munasabah - Terdapatnya keterangan pengedaran serta keterangan pemilikan untuk penggunaan sendiri - Tertuduh diminta membuat pembelaan atas tuduhan pengedaran - Samada salah arah - Samada Hakim pembicaraan memakai standard pembuktian yang salah - Akta Dadah Berbahaya 1952 s. 39A(2)(a), 39B(1)(a) - Kanun Acara Jenayah s. 180*

Pihak perayu dituduh dengan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 kerana mengedarkan 24.88 gram heroin pada 14 April 1985, dan setelah disabitkan telah dihukum mati pada 1990. Perayu telah membuat rayuan dan membawa hujah bahawa sabitannya adalah tidak sempurna kerana Mahkamah dibawah adalah salah dalam memanggilnya membuat pembelaan.

Tidak dipertikaikan bahawa di Mahkamah bawah, pada akhir kes pendakwaan, keterangan yang dikemukakan oleh pendakwa adalah konsisten dengan rumusan bahawa perayu telah melakukan kesalahan pengedaran, dan juga rumusan bahawa beliau memiliki dadah tersebut untuk penggunaannya sendiri dan bukan untuk pengedaran. Fakta menunjukkan bahawa Hakim yang arif, sewaktu memanggil perayu untuk membuat pembelaan, telah memakai standard pembuktian *prima facie*, kerana mengikut kes *Munusamy v Pendakwaraya*. Di hadapan Mahkamah Rayuan, soalan utama yang timbul adalah samada dengan mengambilkira keputusan terbaru kes *Arulpragasan v. Pendakwaraya,* dan pindaan kepada s. 180 Kanun Acara Jenayah yang mengekorinya, Hakim yang arif telah melakukan salah arah undang-undang apabila memilih standard pembuktian *prima facie* dan memanggil perayu untuk membuat pembelaan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Dengan mengambilkira keputusan dalam *Arulpragasan a/l Sandaraju v. Pendakwaraya*, undang-undang mengenai standard pembuktian yang diperlukan di akhir kes pendakwaan telah ditetapkan iaitu pembuktian melebihi keraguan yang munasabah.

[2] Oleh kerana di akhir kes pendakwaan, keterangan kes pendakwa menghala ke dua versi yang bertentangan, iaitu bahawa perayu memiliki dadah untuk tujuan pengedaran, atau sebaliknya, bahawa dia memilikinya untuk penggunaan sendiri yang cukup mematahkan anggapan pengedaran, pendakwa tidak boleh dikatakan telah membuktikan kesnya melebihi keraguan munasabah, walaupun mereka boleh dikatakan telah membentuk kes *prima facie*. Hakim yang arif dengan itu adalah salah dalam memanggil pembelaan atas tuduhan pengedaran.

[3] Hakim yang arif tidak boleh disalahkan kerana mengikut *Munusamy v. Pendakwaraya* kerana pada masa itu ia merupakan tafsiran tunggal s. 180 Kanun Acara Jenayah. Namun demikian, berasaskan keputusan majoriti dalam *Arulpragasan*, mestilah dianggap bahawa tafsiran s. 180 sejak mula lagi adalah ujian melebehi keraguan munasabah dan bukan tahap *prima facie.*

[4] Pindaan kepada s.180 Kanun Acara Jenayah yang memperuntukkan standard *prima facie* di akhir kes pendakwaaan tiada kesan kebelakangan. Dengan itu, pindaan tersebut, yang diwartakan pada 30 Januari 1997, adalah untuk semua tujuan praktikal hanya berkuatkuasa pada 31 Januari 1997. Pindaan tersebut dengan itu akan terpakai ke atas semua kes yang difailkan selepas tarikh itu (termasuk kes yang diputuskan tetapi menanti rayuan) tetapi bukan yang selainnya. Dalam semua kes sebelum 31 Januari 1997, tahap melebehi keraguan munasabah akan terpakai.

[5] Oleh kerana Hakim yang arif telah melakukan salah arah kepada dirinya mengenai standard pembuktian bila memanggil perayu untuk memasukkan pembelaannya atas tuduhan pengedaran, maka sabitan perayu di bawah s. 39B(1)(a) seterusnya perlu, dan adalah dibatalkan. Bagaimanapun, dengan memakai tahap pembuktian melebihi keraguan munasabah terdapat keterangan yang kuat akan pemilikan dadah di akhir kes pendakwaan. Oleh yang demikian, perayu adalah disabitkan di bawah s. 39A(2)(a) Akta Dadah Berbahaya 1952 dan dihukum 15 tahun penjara dan 10 sebatan.

[Rayuan dibenarkan. Perintah seperti dinyatakan.]

Cases referred to:
Arulpragasan a/l Sandaraju v. PP [1996] 4 CLJ 597 ***(foll)***
Cohen Lorrens Phillips & Anor. v. PP [1989] 3 MLJ 289 ***(cit)***
Munusamy v. PP [1987] 1 MLJ 492 ***(cit)***

Legislation referred to:
Criminal Procedure Code, s. 180
Dangerous Drugs Act 1952, ss. 37(d), 39A(2)(a), B(i)(a)

[Appeal from High Court Malaya, Johor Bahru; No: 58-2-1986]

For the appellant - Gurbachan Singh; M/s. Bachan & Kartar
For the respondent - Mohd. Yusoff; Deputy Public Prosecutor

JUDGMENT

Shaik Daud Ismail JCA:

The appellant was charged in the Johore Bahru High Court and convicted on 4 November 1990 for trafficking in 24.88 grammes of heroin on 14 April 1985, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and he was sentenced to death. The facts leading to the appellant's arrest and the recovery of the drugs on him are not in dispute. In fact the appellant admitted being in possession of the drugs concerned, but he maintained that it was for personal use and not for trafficking. At the request of the defence, evidence was indeed introduced through Inspector Kamaluddin Kassim PW5 of the appellant's previous convictions, marked as exh. P5 which disclosed that he had three previous convictions for possession of dangerous drugs including morphine between 1976 to 1984, consistent with his contention that he was a habitual drug user. The main ground of appeal is that the learned Judge erred in not holding that the prosecution was bound by law to prove a case beyond reasonable doubt at the close of the case for the prosecution. In other words the main issue in this appeal is on the standard of proof required of the prosecution at the close of its case, having regard to s. 180 of the Criminal Procedure Code (CPC).

The offence was in 1985 and the trial concluded in 1990. What, therefore, is the law applicable to the instant case, on the standard of proof required of the prosecution at the close of its case. Without the necessity of embarking into the history on this issue all over again, suffice for us to hold that in the light of the recent decision in *Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597, the law on the standard of proof required of the prosecution at the close of its case is finally settled and that is beyond a reasonable doubt. We need only cite one passage in the majority judgment of Eusoff Chin CJ at p. 12:

> It is trite law that the onus is on the prosecution throughout the entire case in any criminal trial to prove the charge against the accused beyond reasonable doubt. In my view, the same standard of proof applies at the intermediate stage of the trial, i.e. at the close of the prosecution.

Whatever our personal sentiments may be on this issue, we are bound by the decision in the *Arulpragasan* case. What is the difference between a *prima facie* case and a beyond reasonable doubt case? The distinction has been illustrated in the judgment of Edgar Joseph Jr. FCJ in *Arulpragasan a/l*

Sandaraju v. PP at p. 646 [1996] 4 CLJ 597; and at p. 41-42 [1997] 1 MLJ 41 in the following words:

> Having regard to the principles enunciated in the above authorities and the article by Glass J, the following two examples will help to illustrate the difference between applying "the *prima facie* case" and "the beyond all reasonable doubt" test in the prosecution's evidence at the conclusion of its case.
>
> Take a case where the prosecution's evidence points to two likely inferences, one consistent with guilt, the other with innocence. In such situation, if the standard of proof is that of a mere "*prima facie* case", in other words "a *prima facie* supposition that the accused may be guilty", then the trial ought to proceed and the defence would have to be called (See, *Karam Singh v. PP* (*ibid*, at p. 30 Col. 2 C & D, per H.T. Ong CJ)).
>
> If, on the other hand, the standard of proof is "beyond reasonable doubt", then in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to be acquitted and discharged without his defence being called.
>
> Another example which helps to further illustrate the point that there is a fundamental difference between applying a mere *"prima facie"* standard of proof and the "beyond all reasonable doubt standard of proof", at the intermediate stage of the trial, would be where, at the conclusion of the prosecution's case, there is strong prosecution evidence but there remains a reasonable tenable doubt. In such a situation, if the standard of proof is a mere "*prima facie* case", in other words, a mere *prima facie* supposition that the accused may be guality, then also the trial must proceed, and the defence would have to be called. On the other hand, if the standard of proof is "beyond all reasonable doubt", then, in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to be acquitted and discharged without his defence being called.

In the present appeal, at the close of the case for the prosecution, there was already evidence before the Court of two conflicting versions of the prosecution case, that he was in possession of the drugs for the purpose of trafficking, or alternatively, that he was in possession of the heroin for his own consumption as in the case of *Cohen Lorrens Phillis & Anor. v. PP* [1989] 3 MLJ 289, sufficient to rebut the presumption of trafficking under the s. 37(d) Dangerous Drugs Act 1952. In such a situation, the prosecution could not be said to have proved its case beyond reasonable doubt, although it might be sufficient to establish a *prima facie* case. The learned trial Judge would be correct in law in calling for the defence on the charge of trafficking on the *prima facie* principle, but not if the law applicable is the beyond reasonable test as enunciated in *Arulpragasan.*

At the close of the case for the prosecution in the instant case, although the learned Judge had not expressed in so many words, it is obvious to us that he applied the standard of proof as interpreted in *Munusamy v. PP* [1987] 1 MLJ 492. At that time the interpretation of s. 180 CPC was as decided in that case. Following that decision the standard proof was the *prima facie* standard. The learned Judge cannot be faulted for this as at that time that was the only interpretation of s. 180 CPC. We now agree with the submission of Counsel for the appellant, as conceded to by the learned DPP, that in view of the majority decision in *Arulpragasan*, it must be taken that the interpretation of s. 180 all along ought to have been the beyond reasonable doubt standard and not the *prima facie* standard.

While we appreciate that s. 180 CPC has now been amended to provide for a *prima facie* standard of proof at the close of the case for the prosecution, it cannot be gainsaid that, that amendment has no retrospective effect. There is nothing in the amendment itself to even suggest this. Therefore, it is never in doubt that Parliament in its wisdom has not made it retrospective. Both the learned DPP and the learned Counsel for the appellant conceded this. Therefore, the amendment having been gazetted on 30 January 1997 would for all practical purposes come into effect only on 31 January 1997. Thus, the amendment would only be applicable to cases filed after that date and not to cases before that date and this would include decided cases pending appeal. In all cases before 31 January 1997 the beyond a reasonable doubt standard of proof must of necessity apply as there can be only one interpretation of s. 180 CPC all along, and that is as decided by the majority decision in *Arulpragasan.*

We, therefore, hold that in the instant case there was a clear misdirection on the standard of proof and the learned Judge ought not to have called upon the appellant to enter into his defence on the trafficking charge. We would allow the appeal, quash the conviction under s. 39B(1)(a) of the Dangerous Drugs Act 1952, and accordingly set aside the death sentence.

We find that applying the standard of proof of beyond a reasonable doubt, at the close of the case for the prosecution there were overwhelming evidence of possession of the drug in question, coupled with the admission of the appellant. We, therefore, substitute a conviction under s. 39A(2)(a) of the Dangerous Drugs Act 1952. After considering the plea in mitigation from learned Counsel for the appellant, we sentenced appellant to 15 years imprisonment with effect from his date of arrest plus 10 strokes of the rotan.

Reported by WA Sharif